STATE OF MICHIGAN

COURT OF APPEALS

ALDEN STATE BANK,

Plaintiff/Counter-Defendant/Appellee,

v

ROSALEEN T. BORTON, and RICHARD K. BORTON,

Defendants/Counter-Plaintiffs/Third-Party-Plaintiffs/Appellants,

and

LAURENCE E. MAUER, and RITA P. MAUER,

Defendants,

and

CHRISTINE T. DUNLOP, CHRISTINA L. DULL, and BAY BREEZE DEVELOPMENT, INC.,

Third-Party Defendants.

UNPUBLISHED
November 17, 2005

No. 262160
Antrim Circuit Court
LC No. 04-008082-CK

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendants Rosaleen and Richard Borton (the Bortons), appeal as of right an order granting plaintiff Alden State Bank (the Bank) summary disposition on their action to quiet title, and dismissing the Bortons' counter-complaint with prejudice. We affirm.

I. Basic Facts and Proceedings

Bay Breeze Development Co (Bay Breeze) was the owner and developer of a fifteen-unit[1] condominium project located in Elk Rapids, Michigan. The Alden State Bank (the Bank) financed the construction of the project, issuing two notes to Bay Breeze together worth approximately $1 million. The notes were secured by mortgages on the condominium project, and other Oakland County residential properties owned by Bay Breeze's president and sole shareholder, Christine L. Dull, and Christine Dunlop (West Bloomfield property). The Bortons purchased one of the units in the condominium project. Five other units had also been purchased.[2]

Bay Breeze fell behind on mortgage payments, and, on February 24, 2004, entered into an Agreement with the Bank. The Agreement provided that Bay Breeze would place into an escrow account, a "Quitclaim Deed in Lieu of Foreclosure," which, upon Bay Breeze's failure to pay its indebtedness by June 1, 2004, would grant title to the nine remaining unsold condominium units to the Bank. The Agreement also provided that the Bank "could initiate legal action to collect on the remaining balance of the notes secured by a certain mortgage [on the West Bloomfield property]." Bay Breeze failed to pay its debt by June 1, 2004, and on June 3, 2004, the Bank recorded the deed.

Sometime in late April or early May 2004, the Bortons filed an action against Bay Breeze and Dull claiming that they had not deposited monies into escrow to pay for the "must builds" of the project. On May 27, 2004, the Bortons filed a Notice of Lis Pendens, indicating that a lawsuit was pending involving their unit. On June 19, 2004, following a hearing, the trial court entered an order of default against Bay Breeze and Dull. On July, 1, 2004, the trial court appointed a special master. The special master reported that "Bay Breeze [] conveyed all of its real property which comprised virtually all of its assets to Alden State Bank on February 24, 2004, and that such conveyance was in direct contradiction to and with the statements made by [Bay Breeze and Dull] to the Court on June 19, 2004." On the basis of special master's report, and the admissions at the June 19, 2004 hearing, the trial court entered a default judgment against Bay Breeze in the amount of $617,076.97, and against Dull in the amount of $806,076.97. Shortly before the trial court entered the default judgment, the Bortons filed an Individual Claim of Interest in Real Property purportedly arising under the master deed to the condominium project.

On November 24, 2004, the Bank filed a complaint to quiet title seeking to remove the notice of lis pendens and the Individual Claim of Interest in Real Property filed by the Bortons. The Bortons filed a multi count counter-complaint against the Bank. The trial court, in a written opinion, granted the Bank summary disposition on its complaint to quiet title, concluding that because there was no longer pending litigation involving the Bortons' unit, the notice of lis

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[1] There is some dispute over how many units are in the project, which will later be addressed.

[2] Defendants Laurence and Rita Mauer also purchased one of the units. The Mauers were dismissed from this action.

pendens was invalid, and that the individual claim of interest in real property merely reiterated rights established under the master deed, and was therefore also invalid. The trial court's opinion also stated that "[the Bortons'] counterclaim is dismissed with prejudice." On appeal, the Bortons limit their challenges to the trial court's dismissal of their counter-complaint.

II. Analysis

The trial court's opinion does not indicate whether the Bortons' counter-complaint was dismissed under MCR 2.116(c)(8) or (10). However, the trial court relied on evidence outside the pleadings in arriving at its decision to dismiss the Bortons' counter-complaint, and therefore, this Court's review is under MCR 2.116(c)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998).

This Court reviews a trial court's grant of summary disposition de novo. *Dressel v Ameribank*, 468 Mich 577, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* Summary disposition may be granted when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." MCR 2.116(C)(10).

Count I: Declaration that the Debt Underlying the Mortgage on the West Bloomfield Property is Released

The Bortons claim there is evidence that the Bay Breeze property is valued at $1,755,000,[3] and argue that "[i]f the Bay Breeze Mortgages and the West Bloomfield Mortgage were given to secure a debt of only $1,067,200.00, then the transfer of the Bay Breeze Property via the Quit Claim Deed could more than satisfy the debts owed to [the Bank], there would be no West Bloomfield Mortgage to collect upon, and Dull and Dunlop would have no further liability to [the Bank.] We disagree.

The Bortons' claim is unenforceable as a matter of law. The Agreement between the Bank, Dull and Bay Breeze expressly provides that: "After the expiration of the escrow, the Bank can initiate legal action to collect on the remaining balance of the notes secured by a

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[3] The Bortons reliance on the appraisal of Bay Breeze property is problematic. The Bortons, throughout their brief on appeal, refer to the Bank's collection plan memorandum regarding Bay Breeze and Dull. Attached at appendix K of the Bortons' Brief on Appeal. The memorandum states that an appraiser had separately appraised "Units 1, 3, 4, 5, 6, 10, 11 totaling $860,000.00." "Unit 7 was appraised at $450,000.00" and "Unit 8 at $445,000.00. The memorandum then states that "[t]hese values amount to a grand total of $1,755,000.00." The Bortons' apparently rely on the sum of individual unit appraisals to establish an aggregate appraisal amount. This valuation approach is questionable.

certain Mortgage [the West Bloomfield property]." The Bortons are not a party to this Agreement, nor are they mentioned in the Agreement. Further, the Agreement does not state or imply that the Bank must release mortgages based upon appraisals of the Bay Breeze property.

Here, the Bortons "cite no authority to support their contention that even though they were not parties to the . . . [A]greement, [the Bank] owed them certain duties, including a duty to execute the agreement in a manner that would preserve [the Bortons'] investment, where the agreement does not reference [the Bortons'.] *Frick v North Bank*, 214 Mich App 177, 180; 542 NW2d 331 (1995). Thus, the Bortons' claim is unenforceable as a matter of law. *Id.* at 179-180.

Count II: The Bay Breeze Mortgage is Extinguished

The Bortons claim that because the debt secured by the Bay Breeze property mortgage, $1,067,200, is far less than the appraised value of the Bay Breeze property, $1,755,000, the mortgage underlying the Bay Breeze property is extinguished. We disagree.

"[W]hen the holder of a real estate mortgage becomes the owner of the fee, the former estate is merged in the latter." *Byerlein v Shipp*, 182 Mich App 39, 48; 451 NW2d 565 (1990), quoting *Anderson v Thompson*, 225 Mich 155, 159; 195 N.W. 689 (1923); See also *Vollmer v. Coenis*, 309 Mich 319, 324, 15 NW2d 654 (1944). However, that rule is "subject to the exception that when it is to the interest of the mortgagee and is his intention to keep the mortgage alive, there is no merger, unless the rights of the mortgagor or third persons are affected thereby." *Byerlein, supra* at 48, quoting *Anderson, supra*.

Further,

> The intention is controlling. It is either expressed or is implied from the circumstances of the transaction. If it is to the interest of the mortgagee to keep the mortgage alive, the intention to do so will be implied; for it is presumed that a man intends to do that which is to his advantage. But if the intention to merge the estates is expressed, the fact that it is to his benefit to keep the mortgage alive is immaterial. [*Byerlein, supra* at 48, quoting *First National Bank of Utica v Ramm*, 256 Mich 573, 575; 240 NW 32 (1932)

Here, the "Quitclaim Deed in Lieu of Foreclosure" states,

> IT IS EXPRESSLY UNDERSTOOD that the execution and delivery of this instrument and conveyance shall not in any manner be deemed to be a merger or the extinguishment [the Bay Breeze property mortgages], which said Mortgages shall be and remain in full force and effect according to the tenor of this instrument.

The Quitclaim Deed in Lieu of Foreclosure shows the parties intended no merger.

The only remaining question if "the rights of the mortgagor or third persons are affected thereby." Here, the record reflects that the Bortons are mere judgment creditors of Bay Breeze and Dull. However, "[a]s Michigan courts have explained, the purpose of declining to find a merger is to allow a mortgagee/lender to protect itself from the claims of junior lienholders of the

mortgager/borrower." *United States Leather, Inc v Mitchell Manufacturing Group*, 276 F3d 782, 789 (CA 6, 2002). The Bank is not obligated to the Bortons, but is attempting to protect itself from junior lien holders. *Id*. at 788. Thus, there is no merger.

Count III: The Bank Is Liable As A Successor Developer

The Bortons claim that the Bank is a "successor developer" under MCL 559.235. We disagree.

Under MCL 559.235,a "'successor developer'" means a person who acquires title to the lesser of 10 units or 75% of the units in a condominium project, other than a business condominium project, by foreclosure, deed in lieu of foreclosure, purchase, or similar transaction."

Here, the deed in lieu of foreclosure states that the Bank acquired title to nine units. Further, exhibit B to the master deed, the subdivision plan, indicates there are fifteen units in the project. Nine of fifteen units represents sixty percent pf the units in the project. Therefore, because the Bank did not purchase "the lesser of 10 units or 75% of the units in a condominium project," there are not a successor developer.

The Bortons claim a genuine issue of material fact exists because the Bank, in response to an interrogatory requesting the Bank to "Admit that Alden acquired title by the Quit Claim Deed in Lieu of Foreclosure to nine (9) units of the Bay Breeze Properties," replied, "[t]he quitclaim deed clearly provides for ten units." The Bortons also claim that there are sixteen units in the project. In support, they rely on an appraisal that indicates there are sixteen units in the project.

However, MCL 559.235 states that a "successor developer" means a person who acquires "title." Here, the Bank's response to an interrogatory does not establish that it acquired "title" to ten units, rather only that it believed the deed indicated that it acquired ten units. For the same reason, the appraiser's belief that that there were sixteen units in the projects does not establish that which is plainly indicated in the master deed. Therefore, the trial court properly dismissed the Bortons' claim that the Banks was liable as a "successor developer."

Count IV: The Bank Is Liable For Pro Rata Share Of "Must Be Built" Items

The Bortons' claim in large part, admittedly, turns on its claim that the Bank is liable as a successor developer. However, as discussed, the Bank is not a successor developer. The Bortons further argue that the Bank is liable based on its in-court statements. We disagree.

The Banks counsel stated:

> And whether or not we will be in position – if the plaintiff is requesting that we be named the – named the successor developer, we may have a motion in that regard, but certainly the bank understands that no matter what, they have responsibility for at least their proportional share of whatever expenses have to be incurred, so that is something that the bank clearly understands.

Regardless, the developer is liable for the "must be built" items, and indeed remains liable despite "the transfer of the developer's interest in the condominium project." MCL 559.234. Thus, Bay Breeze remains liable for the "must be built items," and the Bank is not obligated any more than the Bortons to pay any share of the "must be built" items.

Count V: The Bank Violated A Court Injunction

The Bortons argue that the Bank's violation of a court injunction entitles them to damages. We disagree.

On July 1, 2004, the trial court issued an injunction enjoining Bay Breeze and Dull from dispersing any funds and that "[a]ll funds on hand or on deposit and any fund to come into the possession, custody of control of [Bay Breeze and Dull] are to be placed in an escrow account and held there pending further order of the Court except normal expenses necessary to the sale of real property owned by [Bay Breeze], which is expense may include real estate commissions, transfer taxes, and recording fees." The Bank acknowledges an individual named Gary Hahnefeld wired $6,300 into Dull's account. The Bank also acknowledges that it issued a cashier's check in the amount of $5,950 from Dull's account to Washington Mutual Bank. The Bank claims that the check was issued "for the express purpose to pay $6,000.00 to Washington Mutual Bank for a mortgage Payment."

Our Supreme Court has before indicated a plaintiff may be entitled monetary judgment where (1) defendant was guilty of contempt; (2) that defendant's misconduct caused actual loss or injury. *Montgomery v Muskegon Booming Co*, 104 Mich 411, 413; 62 NW 561 (1895).

At the summary disposition hearing, the trial court specifically questioned the Bank's counsel in regard to the wired monies. The bank's counsel responded that:

> . . . Mr. Fox, who was the main person handling this account because he was a loan officer in charge of this account, was on vacation. There was some money that was wired for the specific purpose of being applied to these mortgages on the property in Oakland County. There is an attachment to our brief which indicates that the person who wired those funds wired them for that explicit purpose. So although technically the funds may have entered in Christina Dull's account, they should not have been because the specific purpose they were wired for was simply to make payment on this Oakland County mortgage.

Here, the trial court impliedly accepted the Bank's representation that it had not willfully violated the court order. "Contempt of court is defined as a 'willful act, omission, or statement that tends to . . . impede the functioning of a court.'" *In re Contempt of Dudzinski*, 257 Mich App 96, 667 N.W.2d 68 (2003) (citations omitted). Although the Bortons' theorize that the Bank wired the monies to maintain its interest in its junior mortgage on a particular property, there is no evidence that its employee who facilitated the transaction knew of the court order. Consequently, there was no evidence that the Bank acted willfully in violating the order, and therefore, the trial court was within its discretion not to hold the Bank in contempt.

Count VI: The Bank Is Liable As An Escrow Agent

The Bortons argue that the Bank is liable as an escrow agent to purchase agreement between another condominium unit purchaser and Bay Breeze. We disagree.

In support of their claim, the Bortons rely on an addendum to an August 7, 2002, purchase agreement between Dennis Valkanoff and Bay Breeze, which indicates that $20,000 of earnest money would be deposited in an escrow account with the Bank as the escrow agent.

Although the addendum to the agreement between Dennis Valkanoff and Bay Breeze does indicate that [t]he $20,000 paid down at the signing of the contract will be held in escrow at the Alden State Bank," there is no evidence suggesting that $20,000 was actually held in escrow at the Bank. Further, the Bortons have not presented evidence that the Bank agreed to act as an escrow agent. Therefore, the trial court properly dismissed this claim.

Counts VII and VIII: The Transfer Of The Bay Breeze Property Must Be Voided As A Fraudulent Transfer Pursuant To MCL 566.34 and MCL 566.35(1)

The Bortons argue that the Bay Breeze property conveyance must be voided as a fraudulent. We disagree.

The Bortons cite the following portion of MCL 566.34, to establish their first claim of fraud:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
>
> (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

The Bortons also cite the following portion of MCL 566.35, to establish a claim of fraud:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

In regard to MCL 566.34(1)(a), the Bortons have failed to show an intent to fraud. While the conveyance to the Bank would undoubtedly would hinder and delay other creditors, "the conveyances were valid if given in good faith and for a fair consideration. [Bay Breeze and Dull] had a right to prefer them to other creditors." *Bankers' Trust Co of Detroit v Humber* 263

Mich 426, 428; 248 NW 858 (1933), citing *Warner v Longwell*, 261 Mich 468, 246 NW 188 (1933).

Thus, the remaining dispositive question, under MCL 566.34 and MCL 566.35, is whether the Bortons have establish that Bay Breeze and Dull did not receive a "reasonably equivalent value in exchange for the transfer or obligation." In this regard, the Bortons' solely rely on appraisals of the Bay Breeze condominium units to establish that Bay Breeze and dull did not receive reasonably equivalent value in exchange for the property. However, an "appraisal" is merely an estimate. Black's Law Dictionary (6th ed). The Bank averred that the best offer on the property was $1,050,000, which is less than the amount owed the Bank at the time of the conveyance. The Bortons have presented no evidence that a higher offer was or could be obtained. Thus, there is no genuine dispute that Bay Breeze and Dull conveyed the property receiving a reasonably equivalent value in exchange.

Affirmed.

/s/ Pat M. Donofrio
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly